NO. 92-731

Supreme Court, U.S.
FILED
MAY 8 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1991

KAREN SMITH AND STANLUS SMITH,
Petitioners

VERSUS

WAL-MART STORES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

1. Did the Fifth Circuit Court of Appeals violate the appropriate standard for appellate court review in its reversal of the jury verdict in plaintiffs' favor?

2. Did the actions of the Fifth Circuit Court of Appeals, in reversing the jury verdict in plaintiffs' favor, have the effect of depriving plaintiffs of their Seventh Amendment right to a trial by jury?

LIST OF PARTIES

The caption of the case in the Court contains the names of all parties to the proceeding in the Court of Appeals insofar as its judgment is sought to be reviewed.

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DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is unreported. It is reproduced in the Appendix of this Petition.

STATEMENT OF JURISDICTION

The judgment (opinion) of the Court of Appeal was entered on January 24, 1992. A Petition for Rehearing was denied on February 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Jurisdiction in the trial court was based on diversity of citizenship of the parties (28 U.S.C.A. 1332).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Amendment VII, United States Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This petition arises out of a ruling by the Fifth Circuit Court of Appeals which reversed a district court jury verdict favorable to the plaintiffs and a denial of plaintiffs' Motion for Rehearing. The original suit in the District Court was filed pursuant to the jurisdiction conferred by 28 U.S.C.A. 1332.

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit Court of Appeals, which reversed a district court jury verdict favorable to plaintiffs, violated the appropriate standard for apellate court review, inasmuch as the Court, in considering the evidence presented at trial, evaluated the credibility of witnesses and resolved issues of conflicting and contradictory testimony, which were functions for the jury. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (see Rule 10 of the Supreme Court Rules).

2. The actions of the Fifth Circuit Court of Appeals, which reversed a district court jury verdict favorable to plaintiffs, had the effect of depriving plaintiffs of their Seventh Amendment right to a trial by jury.

ARGUMENT

I.

The appropriate standard for appellate court review of a jury verdict is set forth in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substan-

> tial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

As the Court further stated in *Bauman v. Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980):

> Following the standard set out in *Boeing Co. v. Shipman*, our sole function as an appellate court is "to ascertain whether there is a rational basis in the record for the jury's verdict; we are forbidden to usurp the function of the jury by weighing the conflicting evidence and inferences and then reaching our own conclusions." (Citing *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1288 (5th Cir. 1974). 611 F.2d at 1119.

As recently as December, 1988, the Fifth Circuit reaffirmed its standard of limited appellate review in the wrongful death case of *Granberry v. O'Barr*, 866 F.2d 112 (5th Cir. 1988):

> Our review of a jury verdict as to the suffi-

ciency of the evidence is *exceedingly narrow* because of the requirements of the right to a jury trial preserved by the Seventh Amendment fo the United States Constitution. "[N]o fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the common law." The common law standard of review is not the "clearly erroneous" standard in a trial before the court as provided in Fed.R.Civ.P. 52(a). Instead, it is the same common law standard which is applied in awarding a directed verdict or a judgment notwithstanding the verdict. The standard of review is usually referred to as a "sufficiency of the evidence" standard. But the *limited scope of our review* is not fully described by such a general statement. In detail, we have stated it this way:

> The standard for appellate review of jury's verdict *is exacting.* The verdict must be upheld unless the facts and inferences point so strongly and so everwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. If there is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded.

Western Co. of North America v. United States, 699 F.2d 264, 276 (5th Cir.), *cert. denied,* 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983). (Emphasis added.) 866 F.2d at 113.

Stated another way, the Court of Appeals may appropriately reverse a jury verdict if reasonable and fair-minded men in the exercise of impartial judgment might not reach different conclusions on the basis of quality and

weight of the evidence. In reversing the jury verdict in this case, the Fifth Circuit Court of Appeals, contrary to the pronouncements in *Boeing,* assessed conflicting evidence and inferences, determined witness credibility, reached conclusions contrary to the jury based upon its own evaluation of conflicting evidence and reached a conclusion contrary to the jury despite evidence that would permit reasonable and fair minded men in the exercise of impartial judgment to reach different conclusions on the issue of the defendant's liability.

One of the issues presented for jury resolution was whether one or two spills of Palmolive existed at the site of plaintiff's accident and whether these spill(s) preceded plaintiff's slip and fall. Plaintiffs' evidence consisted of the following:

> 1. Photographs showing a spill of Palmolive one-half dollar in size, elongated in shape and four (4) inches from the shelf at the spot where plaintiff slipped and fell;
>
> 2. Testimony from defendant's witnesses as to the presence of two to three (2 - 3) tiny drops of Palmolive, twelve (12) inches from the shelf and which had come from the bottle plaintiff knocked off the shelf AFTER HE HAD ALREADY SLIPPED AND KNOCKED AGAINST THE SHELF AS HE WAS FALLING TO THE FLOOR.

Plaintiffs argued to the jury, based on the differences in size and location, there were two separate and distinct spills - one occurring prior to and contributing to plaintiff's accident, and one created when plaintiff knocked a bottle of Palmolive off the shelf AS HE FELL. The Fifth Circuit Court of Appeals, virtually ignoring the evidence on this issue favorable to the plaintiffs, concluded:

> Smith alleges that a slippery substance on the aisle floor caused him to fall. However, neither he nor any other witness testified to the presence of anything slippery on the floor prior to the accident. The uncontroverted evidence from Smith's testimony and the testimony of a witness is that when Smith fell, he hit the shelf and knocked a bottle of dishwashing liquid to the floor. Small drops of dishwashing loquid - two to three in number - were seen on the floor after the accident, presumably having dripped from the bottle that Smith knocked from the shelf. There were no skid marks from or through this liquid, and uncontested testimony indicated that the bottoms of Smith's shoes were dry....

In reaching this conclusion, the Court of Appeals had to, by necessity, discount substantial evidence on which the jury could have reasonably concluded that a separate pre-fall spill existed.

On the issue of causation, i.e. whether this pre-fall spill caused or contributed to plaintiff's accident, the Court of Appeals discounted all of the evidence on this issue that was favorable to the plaintiffs by the simple and cryptic observation that the jury's finding of causation was a product of "pure speculation." However, the Court, in reaching this conclusion, again ignored substantial evidence which the jury had before it:

> 1. A Wal-Mart manager observed that plaintiff was walking in a normal manner and not otherwise impaired prior to his slip-and-fall (in contrast to the plaintiff in another slip-and-fall case, *Brown v. Schwegmann Giant Supermarkets*, 535 So.2d 1307 (La. App., 5th Cir. 1988);
>
> 2. A Wal-Mart manager testified that she observed plaintiff slip and fall on his buttocks;

3. A half-dollar size spot of Palmolive was observed and photographed at the site where plaintiff's feet slipped from under him. This is precisely the type of situation that confronted the jury in *Batiste v. Joyce's Supermarket*, 488 So.2d 1318, 1321 (3rd Cir. 1986), wherein broken eggs were found at the area where plaintiff fell. The Court of Appeal concluded that "the jury's finding that a foreign substance (egg) caused plaintiff to slip and fall is reasonable, and it will not be disturbed on appeal.";

4. The Court of Appeal's finding that there were no skid marks *in the two or three droplets* ignores evidence from which the jury could have reasonably concluded that a second, pre-accident spill existed, which larger spill was, as shown in the photographs of it, elongated, as it might well be if someone had slipped on it;

5. The absence of skid marks relied upon as a critical factor by the Fifth Circuit, is standing alone, not conclusive;

6. The Court's reliance on the testimony of the store manager that the plaintiff's soles were dry is misplaced and overstated - the jury could and did properly disregard or give little weight to this testimony, inasmuch as this witness' observation was made *solely* from a standing position over plaintiff's prone body without feeling or closely observing these shoe soles.

The evidence before the jury established that the plaintiff slipped and fell for no apparent reason, i.e. physicially impaired or running through the store, that after the fall, the area was examined and a spot of a slippery foreign substance was found at the site where plain-

tiff's feet slipped form under him. It is respectfully submitted that the jury could and did reasonably conclude that the pre-fall spill caused plaintiff's feet to slip. The Court of Appeals' usurping of the jury function on this issue violated their own standard, as set forth in *Boeing Co.*, supra, and its progeny, that the panel's sole function is "to ascertain whether there is a rational basis for the jury's verdict; we are forbidden to usurp the function of the jury by weighing the conflicting evidence and inferences and then reaching our own conclusion." *Bauman*, supra, at 1119.

However, the most telling example of thie Fifth Circuit's failure to adhere to the appropriate standards of appellate review involves the Court's observation, again brief and cryptic, as to Wal-Mart's "clean up measures":

> Testimony from Wal-Mart employees indicated that the aisle was checked for spills regularly. Again, there is absolutely no evidence of a spill or of any breakdown in the usual procedures for checking the aisle...."

To reach this conclusion, the Court would have had to resolve conflicting and contradictory testimony by the three Wal-Mart employees entrusted with checking the aisle where plaintiff slipped and fell, which resolution was the sole perogative and function of the jury. The evidence as to Wal-Mart's "clean up" measures consisted of the following:

> 1. Ms. Rachael Wrinkle, the department manager, testified that she checked the aisle where plaintiff fell several minutes before the accident in the company of her boss, Mr. Larry Howard. Mr . Howard refuted this testimony. He testified that he did *NOT* walk the aisle with

Ms. Wrinkle but, rather, did a perimeter walk, merely passing by the aisle, quickly glancing down it while heading to the front of the store to answer a page.

2. Ms. Jacquelyn Williams, the store's maintenance employee, also testified that she walked down this aisle a few minutes prior to the accident. However, Ms. Wrinkle testified that the last time she saw Ms. Williams in her department was more than one hour prior to the accident. Moreover, the jury was confronted with the fact that Ms. Williams (a) regularly did a safety sweep of this massive store in only 15 to 20 minutes, (b) did not sweep all of the tiled aisles as she was required to do by company policy, and (c) she was the only maintenance employee on duty during her shift to cover the entire Wal-Mart store.

In light of this conflict in testimony, it was permissible and appropriate for the jury to disregard the contradicted testimony of Ms. Wrinkle or give it little, if any, weight. The testimony of Ms. Williams as to her pre-accident presence in the aisle was not only brought into question by Ms. Wrinkle, but showed a sweeping procedure (only one employee so assigned to this massive store - eighteen (18) minutes to "sweep" the entire tiled area) that the jury, as reasonable and fair-minded individuals, could conclude that such procedure as actually followed by the store's witnesses was not reasonable for the size of the store or done with sufficient attention to detail as to be effective. By deciding against plaintiffs and concluding that there was "absolutely no evidence of any breakdown in the usual procedure for checking the aisles", the Court of Appeals had to, by necessity, resolve the conflicting and contradictory testimony noted above, which was clearly the sole function of the jury to resolve.

The issue presently before this Honorable Court goes to the very nature of the jury verdict and the authority of the Court of Appeals to reverse that verdict. This matter goes to the very sanctity of a factually based jury verdict. If the plaintiffs herein are entitled to a jury of their peers to hear and resolve their claim, the action of the Court of Appeals, in deviating from the standard of appellant review, has effectively denied the right of jury trial to the plaintiffs. It is apparent in this case that the Fifth Circuit accepted and adopted only such facts as it chose, ignoring other critical facts and evidence favorable to the plaintiffs. Nowhere in its *brief* opinion did the Court offer any reasons why this favorable evidence was not felt by them to be of any relevance. The panel substituted its own evaluation of the testimony and evidence for that of the jury. It viewed this evidence differently from the jury and disagreed with the jury. The issue is not whether the appellate court agrees with the jury finding but, stated succintly, whether there is sufficient evidence to support it. By reversing the jury verdict in the face of sufficient evidence to support it, the Fifth Circuit has adopted a standard of review contrary to *Boeing Co.*, supra, and its progency, and effectively denied plaintiffs their Seventh Amendment right to a trial by jury of their claims.

CONCLUSION

If this matter is viewed simply as an insignificant slip-and-fall case, then plaintiffs' counsel would be the first to admit that United States Supreme Court review is unwarranted. However, the issues go deeper and affect every case that comes before the United States Fifth Circuit Court of Appeals - to what extent, if any, can the appellate court substitute its own view of the evidence for that of the

lower court jury. The appropriate standard has been spelled out in *Boeing*, supra: "it is the function of the jury as the traditional finder of the facts, *and not the Court*, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." (Emphasis added.)

In this instance, the appellate court panel, while giving lip service to this standard, has chosen to ignore it - ignoring facts favorable to the plaintiffs and reaching its conclusions based upon the panel's own recitation of the facts which *it* found significant. Moreover, the Fifth Circuit's opinion fails to advise why facts favorable to the plaintiffs were not considered or, alternatively, were rejected.

The ultimate effect has been that plaintiffs' right to a jury of their peers has been negated, contrary to appellate court standards of review, and without sufficient and adequate reasons having been stated for the rejection of those facts and evidence favorable to plaintiffs' case.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3488

FILED
FEB 19 1992

KAREN SMITH AND STANLUS SMITH
Plaintiffs-Appellees,

versus

WALMART STORES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(February 19, 1992)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL.504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

January 24, 1992

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW

No. 91-3488 - Smith v. Wal-Mart Stores, Inc.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

The judgment entered provides that plaintiffs'appellees pay to defendant-appellant the costs on appeal.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/ Rhoda Flowers
Deputy Clerk

Enclosure
Mr. George W. Byrne, Jr.
Mr. Frederick R. Campbell
Ms. Lisa M. Geary

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3488
Summary Calendar

KAREN SMITH
and
STANLUS SMITH

Plaintiffs-Appellees,
Cross-Appellees,

VERSUS

WAL-MART STORES, INC.,

Defendant-Appellant,
Cross-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA 89 3976)

(January 24, 1992)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

This is a slip and fall case involving injuries allegedly

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*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well- settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

sustained by plaintiff Stanlus Smith at a retail store owned by defendant Wal-Mart Stores, Inc. The jury returned a verdict in favor of Smith and awarded damages, concluding that a hazardous condition existed in the store and that Wal-Mart was negligent, and that such negligence was a legal cause of Smith's injuries. The district court entered judgment on the basis of the jury's award. Smith appealed, contesting the amount of the award; Wal-Mart cross-appealed, challenging the finding of liability. Smith has since dropped his direct appeal, leaving only Wal-Mart's cross-appeal for our consideration.

In this circuit, under *Boeing Co. v. Shipman*, 411 F.2d 365, 374, 375 (5th Cir. 1969) (en banc), a jury verdict must be upheld unless "the facts and inferences point so strongly and overwhelming in favor of one party that the court believes that reasonable men could not have arrived at a contrary verdict." This standard is applicable to the instant case, as Wal-Mart appeals the denial of its motion for judgment notwithstanding the verdict. We conclude that there is no evidence on the basis of which the jury reasonably could have found Wal-Mart negligent. Accordingly, we reverse and render judgment in Wal-Mart's favor.

I.

Smith alleges that a slippery substance on the aisle floor caused him to fall. However, neither he nor any other witness testified to the presence of anything slippery on the floor prior to the accident. The uncontroverted evidence from Smith's testimony and the testimony of a witness is that when Smith fell, he hit the shelf and knocked a bottle of dishwashing liquid to the floor. Small drops of diswashing liquid — two or three in number — were seen on the floor after the accident, presumably having dripped

from the bottle that Smith knocked from the shelf. There were no skid marks from or through this liquid. and uncontested testimony indicated that the bottoms of Smith's shoes were dry. Smith testified that he did not see anything on the floor prior to falling and does not know what caused him to slip and fall.

Testimony from Wal-Mart employees indicated that the aisle was checked for spills regularly. Again, there is absolutely no evidence of a spill or of any breakdown in the usual procedures for checking the aisle. Nor is there any evidence of negligence or culpable conduct on the part of Wal-Mart. Smith seems to suggest that merely because he fell, Wal-Mart must be deemed negligent and hence liable. Of course, this is not the law in Louisiana.

II.

A jury cannot engage in mere speculation and conjecture. *Daniels v. Twin Oaks Nursing Home,* 692 F.2d 1321 (5th Cir. 1982). At the time of this incident, the Louisiana law provided, in La. R. S. 9:2800.6, that a "merchant owes a duty to persons who use its premises to exercise reasonable care to keep his aisles, passage-ways, and floors in a reasonably safe condition . . . . In a suit for damages, [the plaintiff] must prove that the accident was caused by a hazardous condition." The instant case is quite similar to *Estes v. Kroger Co.,* 556 So. 2d 240 (La. App. 2d Cir.), *writ denied,* 559 So. 2d 1360 (1990). There, as well, the plaintiff testified that she did not know what caused her fall and that she did not see anything on the floor immediately before her accident. The only positive evidence of a foreign substance was a beet leaf near where she fell. The court held that the plaintiff had failed to meet her burden under section 9:2800.6 of showing that a hazardous condition existed and that she was injured as a result of that condi-

tion. The court noted that no one testified that the plaintiff had slipped and fallen on the leaf and that a store owner "is not the insurer of his customer's safety and is not required to keep the floors of . . . . aisles . . . in perfect condition." *Id.* at 241 (citations omitted).

Similarly, in *Eugene v. Wal-Mart Stores*, 570 So. 2d 216 (La. App. 5th Cir. 1990), a child cut his hand while near a battery rack in the store. The store's manager testified that the battery rack was in good condition with no sharp edges. The court reversed the trial court's finding of liability, holding that "[t]he trial court erred in granting plaintiff recovery since plaintiff did not offer any evidence of a hazardous condition causing the accident." *Id.* at 220. The court observed that the "mere belief [that] the battery rack caused the injury does not support a reasonalbe inference that the [rack cut the inside of his hand].'" *Id.* (quoting *Herron v. Maryland Cas. Co.*, 347 F.2d 357, 358 (5th Cir. 1985)) (brackets in original).

In summary, there is absolutely no evidence of negligence on the part of Wal-Mart in this case. Only pure speculation, fueled perhaps by a suspicion that any slip and fall in a store must be caused by some error on the part of the store's employees, can explain the jury's verdict. But the law does not allow liability to be premised upon such guesswork and speculation.

Accordingly, the district court erred in refusing Wal-Mart's motion for judgment notwithstanding the verdict. The district court's judgment is REVERSED, and judgment is hereby RENDERED in favor of Wal-Mart.